Nos. 94-923, 94-924

In the

Supreme Court of the United States

October Term, 1994

RUTH O. SHAW, *et al.*,
Appellants,

v.

JAMES B. HUNT, JR., *et al.*,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

MOTION TO AFFIRM BY APPELLEES, THE GOVERNOR AND OTHER OFFICIALS OF THE STATE OF NORTH CAROLINA

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LIST OF PARTIES

Appellants are Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy Bullock, James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. Delapp, Jr., Richard S. Sahlie and Jack Hawke.

Appellees are James B. Hunt, Jr., in his official capacity as Governor of the State of North Carolina; Dennis A. Wicker in his official capacity as Lieutenant Governor of the State of the State of North Carolina, and President of the Senate; Daniel T. Blue, Jr., in his official capacity as Speaker of the North Carolina House of Representatives; Rufus L. Edmisten, in his official capacity as Secretary of the State of North Carolina; The North Carolina State Board of Elections, an official agency of the State of North Carolina; Edward J. High, in his official capacity as Chairman of the North Carolina State Board of Elections; Jean H. Nelson, in her official capacity as a member of the North Carolina State Board of Elections; Larry Leake, in his official capacity as a member of the North Carolina State Board of Elections; Dorothy Presser, in her official capacity as a member of the North Carolina State Board of Elections; June K. Youngblood, in her official capacity as a member of the North Carolina State Board of Elections; Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Dr. Oscar Blanks, Reverend David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, and William M. Hodges.

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Pursuant to Rule 18.6 of the Rules of the Supreme Court, appellees, the Governor and other officials of the State of North Carolina (hereinafter "State appellees"), move the Court to affirm the judgment of the three-judge United States District Court for the Eastern District of North Carolina on the grounds that, under the largely undisputed facts before the District Court, no substantial question arises that has not previously been decided by this Court or that would entitle appellants to the relief they seek, thus making further argument unnecessary.

STATEMENT OF THE CASE

The appeals in this congressional redistricting case challenge the efforts of the North Carolina General Assembly to meet the mandates of federal law and otherwise to provide fair and effective representation for all citizens in Congress without sacrificing other legitimate interests. This task -- by no means an easy one -- was met through legislative decisions to create congressional districts encompassing citizens, black and white alike, with shared economic, social and cultural interests, instead of focusing on drawing geographically compact districts that adhered to existing county and municipal boundaries. There is no significant factual dispute about these legislative decisions or the basis for them.

The process began in the spring of 1991 when the House and Senate redistricting committees met with citizens at a series of fifteen public hearings specifically to receive citizens' views about the criteria the General Assembly should use in the redistricting process and the ethnic, geographic, economic or other communities of interest it should consider. *Shaw v. Hunt*, 861 F. Supp. 408, 459-60 (E.D.N.C. 1994). Thereafter the redistricting committees jointly adopted written standards to guide them in the development of plans. Principal among these standards was compliance with the mandates of federal law, specifically one-person, one-vote requirements and anti-vote dilution requirements. Also included among these standards was creation of contiguous districts and adherence to the boundaries of existing precincts and census blocks to the extent practicable. Neither geographic compactness nor adherence to county and municipal boundaries, however, was adopted as standards. *Id.* at 418.

Acting on the belief that the Voting Rights Act required the creation of at least one majority-minority district, the redistricting

committees prepared several plans for consideration, each of which included one such district "centered on the large rural area of proportionately dense African-American population in the north-eastern part of the Coastal Plain, with an arm extending westwardly to include an African-American population in the inner city of Durham, on the eastern end of the 'Piedmont Urban Crescent,' and another arm extending southwardly into the center of the Coastal Plain." *Id.* at 460. Acting on a "freely conceded" motive to gain partisan advantage, Republican legislators advocated the adoption of alternative plans creating at least two majority-minority districts. *Id.* at 458, 462.

The Republican plan receiving the most attention would have created a second "majority-minority" district -- through the aggregation of African-American and Native American voters -- running from "downtown Charlotte at the western end of the Piedmont Urban Crescent southeastwardly approximately 200 miles through all or portions of a number of rural counties along the South Carolina border . . . across the Coastal Plain into downtown Wilmington on the coast." *Id.* at 461. Ultimately, the General Assembly adopted a plan "which included a single majority-minority district centered in the rural northeast and central portions of the Coastal Plain with the arm extending westward into the inner-city precincts of Durham." *Id.*

In accordance with Section 5 of the Voting Rights Act, this plan was submitted to the Department of Justice for preclearance. Opposition to the plan was voiced by "[t]he Republican leadership in the General Assembly and Republican Party officials at the State and national levels [who] actively urge[d] Justice Department officials to deny preclearance on the basis that the plan failed to include two majority-minority districts, which they believed to be required by the Voting Rights Act." *Id.* at 461. On December

18, 1991, the Attorney General refused to preclear the plan essentially on the grounds that failure to create a second majority-minority district accounting for African-American voters in the southern part of the state, as proposed by Republicans, appeared to be for "pretextual" reasons and to protect white incumbents. *Id.* at 462. A debate about challenging the Attorney General's decision in court ensued. For a number of legal, practical and political reasons, no challenge was filed. *Id.* at 462-463.

In January 1992, the General Assembly reconvened in Special Session to prepare new redistricting plans.[1] Ironically, a proposal initially made by Republican legislators to create a second majority-minority district in the Piedmont provided the framework for the plan ultimately adopted, and the vehicle by which the General Assembly would meet its redistricting goals. This plan, as modified and ultimately adopted, (1) enhanced the likelihood of compliance with Section 5 and the avoidance of liability under Section 2 by creating two bare-majority, majority-minority districts, the First District, located in the Coastal Plain, in which African-American citizens constituted 50.5 percent of the registered voters and the Twelfth District, located in the Piedmont Urban Crescent, in which African-American citizens constituted 53.5 percent of the registered voters; (2) avoided undue risk to the reelection of incumbents, Republican and Democrat alike, by preserving the cores of their previous districts; and (3) avoided sacrificing the interests of Democrats by constructing the second majority-minority district from predominately Republican areas rather than predominately Democratic areas.

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[1] The Department of Justice had also refused to preclear the General Assembly's plan for redistricting the State House and State Senate because they improperly minimized minority voting strength for "pretextual" reasons.

Most importantly, the plan -- consistent with the purpose of redistricting in the first instance -- provided citizens with fair and effective representation through the creation of districts encompassing citizens with shared economic, social and cultural interests that relate to the duties of members of Congress. The congruence between the plan and the purpose of redistricting was deliberately intended and specifically directed by the General Assembly, and was accomplished through the creation of a distinctively rural First District and distinctively urban Twelfth District. *Id.* at 467-69. To make the First District distinctively rural, the General Assembly removed Durham, at the eastern end of the Piedmont Urban Crescent, from the district as originally drawn and directed the drafters of the plan to assure that at least 80 percent of the citizens of the district resided outside cities having populations greater than 20,000. *Id.* at 467. To make the Twelfth District distinctively urban, the General Assembly modified the plan proposed by Republicans to exclude rural counties along the Virginia border and to include Durham, Winston-Salem and Gastonia with the other Piedmont Crescent urban areas. The General Assembly also directed the drafters of the plan to assure that at least 80 percent of the citizens of the district resided within cities having populations greater than 20,000. *Id.* at 468. The distinctive rural and urban natures of these districts "is a fact so much within the common knowledge of intelligent inhabitants of the State that it probably is subject to judicial notice." *Id.* at 470.

The Twelfth District extends in an arc westward from Durham through Greensboro and Winston-Salem and then southward to Charlotte and Gastonia, tracing the spine of the Piedmont Urban Crescent. Substantially industrialized and predominately urban, the Piedmont Urban Crescent is a widely recognized regional entity with historical integrity. It "is rightly

described as the 'urban, economic and cultural heart and soul of the State.'" *Id.* at 459. Consistent within its location within the Piedmont Urban Crescent, 86.3 percent of the citizens in the Twelfth District reside in urban areas as defined by the Census Bureau. "This measure of urbanness applies to African-American and white citizens alike: at least two-thirds of the district's white residents and at least three-fourths of its African-American residents live in urban areas as so defined." *Id.* at 470. In stark contrast to the urban Twelfth District, "[t]he First district is wholly within a predominately agricultural region" and "is without question predominately rural in character." *Id.* "The counties included in whole or in part within the District had 64 percent of the State's harvested croplands in 1992." "Of the State's four counties that have agriculture as their principal source of income, all are in the First District." *Id.* African-American and white citizens in the district are both burdened by socio-economic disadvantages. Among all twelve districts, African-American citizens in the First District rank last in measures of income and education and white citizens rank next to last.

"Reflecting their distinctive rural and urban natures . . . the two districts, as intended by the legislature, have correspondingly different and distinctive communities of interest. And, even more important, there are within each of the districts substantial, relatively high degrees of homogeneity of shared socio-economic -- hence political -- interests and needs among its citizens. Belying any intuitive assumption that the very bi-racial make-up and the irregularity of shape and geographical non-compactness of these districts would reflect great diversity and conflicts of interest among their citizens, both anecdotal and expert opinion evidence demonstrates the contrary." *Id.* In the rural First District, the predominance of agriculture and the relatively low socio-economic standing of its citizens give all voters significant and shared

interests, for example, in federal legislation regarding price support programs for tobacco and peanuts and in federal legislation aiding disadvantaged persons. In the urban Twelfth District, the concentration of industry and financial institutions gives all citizens significant and shared interests, for example, in federal legislation concerning trade, banking, urban development and crime.

"These individual observations are validated on a larger scale by expert opinion concerning the homogeneity of basic interests in each of the districts. Based upon reliable analyses using accepted political-social science methodology, the two districts are among the most, rather than the least, homogeneous of the current twelve, in terms of the material conditions and political opinions of their citizens, whether only its white citizens, or only its African-American, or both together are considered." *Id.*

The fact that the formation of districts based on communities of interest, instead of geographic compactness, provides for fair and effective representation of voters is further demonstrated by an examination of voter turnout under the plan. The fundamental representative connection between a member of Congress and the residents of the district is voting. By that measure, the plan adopted by the General Assembly provides fair and effective representation. "Voter participation in the 1992 congressional elections in North Carolina -- with its quite recently created, peculiarly-shaped, non-compact districts -- was higher than the national average that year. It was also higher than that in any neighboring state -- all of which had relatively more compact congressional districts overall. And it was higher than that in the 1988 congressional elections in North Carolina, when the State's districts overall were more geographically compact." *Id.* at 471.

The plan was submitted to the Department of Justice and was precleared on February 6, 1992. Soon thereafter, various Republican officials challenged the plan as an unlawful political gerrymander. That claim was dismissed by a three-judge court and this Court summarily affirmed that decision. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *aff'd*, 506 U.S. ___, 113 S. Ct. 30 (1992).

The complaint in this action was filed on March 12, 1992. This Court, on June 28, 1993, reversed the trial court's decision granting defendants' motion to dismiss for failure to state a claim, and remanded the case for trial. *Shaw v. Reno*, ___ U.S. ___, 113 S. Ct. 2816 (1993). On remand, the District Court, after allowing a motion to intervene as plaintiffs by eleven Republican voters[2] and a motion to intervene as defendants by twenty-two African-American and white voters,[3] conducted a trial from March 28, 1994 to April 2, 1994. In its opinion, as amended on August 27, 1994, the District Court rejected defendants' and defendant-intervenors' arguments that plaintiffs and plaintiff-intervenors had failed to prove they had standing to pursue their claims and that plaintiffs and plaintiff-intervenors had failed to prove the plan was a racial gerrymander. The District Court, however, did find that the plan was narrowly tailored to serve compelling interests and entered final judgment for defendants and defendant-intervenors. Separate notices of appeal were filed by plaintiffs and plaintiff-intervenors and separate jurisdictional statements were filed by them on November 21, 1994. This motion to affirm is submitted in response to both jurisdictional statements.

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[2] Plaintiff-intervenors here are essentially identical to the plaintiffs in *Pope v. Blue*, *supra*.

[3] The lead defendant-intervenor, Ralph Gingles, was the lead plaintiff in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

ARGUMENT

The State appellees believe that the District Court applied erroneous legal standards in determining that appellants had proved their standing to pursue their claims and in determining that appellants had proved a racial gerrymander. The State appellees also believe that these issues present substantial questions, the resolution of which are of great significance to the State and all its citizens. Nevertheless, the State appellees believe that full briefing and argument of these issues is not necessary because the legal standards applied by the District Court in deciding that North Carolina's congressional redistricting plan was narrowly tailored to serve compelling interests fully accord with prior decisions of this Court. Because the State met strict scrutiny standards, the standing and racial gerrymander issues need not be addressed in this case and this Court should summarily affirm the District Court's order. Should this Court determine that the strict scrutiny questions presented by appellants do constitute substantial questions which ought to be fully briefed and argued, the State appellees request that the Court also require full briefing and argument of the standing and racial gerrymander questions.

I. LEGAL STANDARDS APPLIED BY THE DISTRICT COURT IN DETERMINING THAT THE REDISTRICTING PLAN WAS NARROWLY TAILORED TO SERVE COMPELLING INTERESTS FULLY ACCORD WITH DECISIONS OF THIS COURT.

Although variously stated by the appellants in their Jurisdictional Statements, essentially they present three questions to this Court: (1) did North Carolina have a compelling interest in complying with the Voting Rights Act which justified the enactment of a race-based redistricting plan; (2) was the North Carolina redistricting plan narrowly tailored to meet the State's

compelling interest in complying with the Voting Rights Act; and (3) did the court below properly allocate the burden of proof between the parties.

These are not substantial questions requiring full briefing and argument. In applying strict scrutiny to the North Carolina congressional redistricting plan, the District Court faithfully applied *Shaw* and this Court's other decisions prescribing the legal standard for evaluation of race-conscious remedial action. *Shaw v. Hunt*, 861 F. Supp. at 434. Based on demographic, geographic, historical and political facts and circumstances unique to the State of North Carolina, facts which are largely undisputed, the District Court concluded that the General Assembly had a "strong basis in evidence" for concluding that enactment of a race-based redistricting plan was necessary to bring its congressional redistricting scheme into compliance with Sections 2 and 5 of the Voting Rights Act. *Id.* at 474. Furthermore, the District Court found, again based on largely undisputed facts, that the congressional plan creating two remedial districts was "narrowly tailored" to serve the State's compelling interest in voluntarily complying with the unique and far-reaching remedial mandates embodied in the Voting Rights Act. *Id.* at 475. The District Court's careful strict scrutiny analysis of the State's redistricting plan correctly applied the law as articulated in *Shaw* and should, therefore, be summarily affirmed.

A. COMPELLING STATE INTEREST

As the District Court clearly recognized, this Court's decisions firmly establish that compliance with the Voting Rights Act is a compelling interest which may require a state to engage in race-based districting.

> The Supreme Court has long recognized that a state's interest in eradicating the effects of its own past or present racial discrimination is sufficiently "compelling" to support its undertaking of race-based remedial action. *See Shaw*, ___ U.S. at ___, 113 S. Ct. at 2831; *Croson*, 488 U.S. at 491-93, 509-10 (plurality); *id.* at 518 (Kennedy, J., concurring in part and concurring in the judgment); *Wygant*, 476 U.S. at 280-82 (plurality); *id.* at 286 (O'Connor, J., concurring); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). The Court also has recognized that this interest extends to remedying past or present violations of federal *statutes* that are designed to eradicate such discrimination in particular aspects of life. *See Croson*, 488 U.S. at 500 (majority) ("constitutional or statutory violations[s]"); *Wygant*, 476 U.S. at 274-75 (plurality) (Title VII); *id.* at 289 (O'Connor, J., concurring) ("violation[s]) of federal statutory or constitutional requirements"); *Bakke*, 438 U.S. at 307-09 (opinion of Powell, J.) ("constitutional or statutory violations").

Id. at 437.

Contrary to appellants' suggestion, a state, under this Court's decisions, does not need to wait for a judicial finding that its redistricting plan violates the Voting Rights Act or make legislative findings that a redistricting plan violates the Act before it may draw a redistricting plan that deliberately attempts to give effect to minority voting strength. All that is required is that the state have a "strong basis in evidence" for concluding that such action is "necessary" to avoid a violation of the Act. *Id. See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (majority); *Wygant v. Board of Education*, 476 U.S. 267, 277-78

(1986) (plurality); *id.* at 289-90 (O'Connor, J., concurring).[4] To hold otherwise, as recognized by the District Court, would severely undermine a state's incentive to voluntarily meet its civil rights obligations and would "clearly be at odds with [the] Court's and Congress' emphasis on the value of . . . voluntary compliance" with the federal discrimination laws. 861 F. Supp. at 439 (quoting *Wygant*, 476 U.S. at 290, O'Connor, J., concurring).

The strong basis in evidence sufficient to allow a state to engage in race-based redistricting in order to comply with the Voting Rights Act is "information sufficient to support a *prima facie* showing that its failure to do so would violate the Act." 861 F. Supp. at 439. The State need not actually prove a violation of the Act in order to meet strict scrutiny. Such a requirement would impose an unfair burden on the State which would be "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent . . . discrimination and liability to nonminorities if affirmative action *is* taken." *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring). 861 F. Supp. at 439-40 & n.46.

Based on the voluminous record before it, the District Court concluded that North Carolina's General Assembly had a strong basis in evidence for concluding any congressional redistricting plan which did not contain two majority-minority districts would in fact violate Sections 2 and 5 of the Voting Rights Act. *Id.* at 474. The District Court commented particularly on the General Assembly's "powerful, recent institutional and individual memories of the acts rigor in redistricting matters," a reference to

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[4] Other district courts considering challenges to congressional redistricting plans have reached this conclusion. *See Hays v. Louisiana*, 839 F. Supp. 1188, 1217 (W.D. La. 1994) (three-judge court); *Johnson v. Miller*, 864 F. Supp. 1354, 1381 (S.D. Ga. 1994) (three-judge court).

the State's unsuccessful defense of its 1981 State House and Senate redistricting plans against Section 2 challenge in *Thornburg v. Gingles*, 478 U.S. 30 (1986). 861 F. Supp. at 463. The General Assembly was also well informed on the rigors of Section 5 and the nature of the showing that the State must make to establish compliance with Section 5 standards, given its experiences with denials of Section 5 preclearance in 1981 and again in 1991 to its Congressional, House and Senate redistricting plans. *Id.*

A *prima facie* Section 2 case exists when members of a protected racial minority can show (1) their group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) their group is politically cohesive; and (3) the white majority vote sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate. *Growe v. Emison*, ___ U.S. ___, ___, 113 S. Ct. 1075, 1084 (1993); *Voinovich v. Quilter*, ___ U.S. ___, ___, 113 S. Ct. 1149, 1157 (1993). The record before the District Court established beyond dispute that the General Assembly was "specifically aware," based on information provided by the Republican Party, the ACLU and others, from advice by the Justice Department, its own redistricting experts, and from its members' personal knowledge and familiarity with North Carolina and its politics, that the State's African-American minority "could very likely make out a *prima facie* Section 2 challenge" to any redistricting plan that did not contain two majority-minority districts. 861 F. Supp. at 463. The validity of this "general perception" by the legislature was fully documented in the legislative history[5] and by the evidence

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[5] A two volume legislature history containing a complete history of the redistricting process, including transcripts of public hearings, committee meetings and floor debates, along with copies of proposed maps and redistricting plans, was stipulated by the parties. *See* Stip. Ex. 200.

presented at trial. Numerous examples of plans with two majority-minority districts were presented during the redistricting process and the appellants themselves prepared maps that established the potential to create two geographically compact majority-minority districts "under any reading of *Gingles*." *Id.* at 463-65. It was common knowledge, confirmed by evidence at trial, that African-American citizens are politically cohesive in statewide and local elections and that racial bloc voting still persists to a significant degree across the state in both local and statewide elections, including those for United States Congress. *Id.* Members of the General Assembly were "necessarily aware" from their own personal experiences that a Section 2 "totality of circumstances" analysis[6] could establish the State's long history of official voting-related discrimination, the socio-economic effects of past discrimination which hinder the ability of African-Americans to participate effectively in the electoral process, the continued use of racial appeals in election campaigns,[7] and the still disproportionately low numbers of African-Americans being elected to political office. *Id.* at 461-465. Under these circumstances, the District Court's conclusion that the State legislature had a "strong basis in evidence" for concluding that a redistricting plan with two majority-minority districts was necessary to avoid violation of Section 2 of the Act accords fully with this Court's decisions.

The North Carolina General Assembly also had a "strong basis in evidence" for believing that its actions were compelled by Section 5 of the Voting Rights Act. Given the unique and forceful

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[6] The trial record included ample documentation of relevant Section 2 circumstances. *See* Stipulations Offered By Defendant-Intervenors.

[7] The "regrettable fact" of the persistence of racial appeals and tactics in political campaigning also was fully documented at trial. *See* 861 F. Supp. at 465 & n.57.

remedial purpose of Section 5 of the Voting Rights Act to break the cycle of "unremitting and ingenious defiance" of the constitutional guarantees of nondiscrimination in voting by covered jurisdictions, *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966), compliance with Section 5 constitutes a compelling state interest, as acknowledged by the Court in *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2830-31.[8] Logically it follows that when a state's redistricting plan is denied preclearance on the ground that it fails to satisfy the "purpose" or "effect" prong of Section 5, the state has a "strong basis in evidence" for concluding that majority-minority districts may be required to comply with Section 5. The Justice Department has been given the authority and duty to serve as a surrogate for the district court in reviewing Section 5 submissions in order to give the states a fast and inexpensive alternative to litigation in the District Court for the District of Columbia. A Section 5 objection by the Justice Department is therefore properly viewed as "an administrative finding of discrimination" which is sufficient to give a state a compelling interest in taking race-based remedial action. *Regents of the University of California v. Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.). As pointed out by the District Court, to hold otherwise would be inconsistent with the federal policy of encouraging states to comply voluntarily with their obligations under federal civil rights laws and would undermine the central purpose of Section 5. 861 F. Supp. at 442-43.

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[8] Although the discussion in *Shaw* was limited to the "retrogression" standard of Section 5, the District Court properly noted this Court's well established recognition of the "purpose" prong of Section 5, which would require denial of preclearance to redistricting plans which, though non-retrogressive, have been shown not to be free from a racially discriminatory purpose. 861 F. Supp. at 441-442 & nn.31 and 32.

B. NARROW TAILORING

The District Court concluded that North Carolina's redistricting plan is narrowly tailored to meet the State's compelling interest in engaging in race-based redistricting to comply with the mandates of the Voting Rights Act. *Id.* at 475. In reaching this conclusion, the court followed this Court's decisions applying the "narrowly tailored" standard to other types of race-based remedial measures. *Id.* at 444.[9]

> In other contexts, the Supreme Court has looked to five basic factors to decide whether a race-based affirmative action program is "narrowly tailored" to further a compelling state interest in remedying identified discrimination: (i) the efficacy of alternative remedies; (ii) whether the program imposes a rigid racial "quota" or just a flexible racial "goal"; (iii) the planned duration of the program; (iv) the relationship between the program's goal for minority representation in the pool of individuals ultimately selected to receive the benefit in question and the percentage of minorities in the relevant pool of eligible candidates; and (v) the impact of the program on the rights of innocent third parties.

Id. at 445. *See United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (plurality); *id.* at 186-89 (Powell, J., concurring).

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[9] *Shaw* itself does not provide guidance on the narrow tailoring analysis in the redistricting context, merely indicating that a redistricting plan would not be narrowly tailored to serve the state's interest in complying with the Voting Rights Act if it "went beyond what was reasonably necessary to avoid" a violation of the Act. ___ U.S. at ___, 113 S. Ct. at 2831.

The District Court carefully and systematically evaluated each of these established factors in light of the largely undisputed evidence. 861 F. Supp. at 445-48. Appellants only seriously contest the District Court's application of the final factor -- impact of the plan on third parties. The basis for appellants' argument is an alleged burden imposed on innocent third parties by the irregular shapes and non-compactness of the majority-minority districts in the State's plan. In their view, a district is not narrowly tailored unless it is the most geographically compact district available.

To begin with, there is no factual basis for this argument. Appellants failed to prove that the plan harms the representational interests of voters. The absence of such harm is vividly demonstrated by the level of voter turnout under the plan. Moreover, this argument is not well-founded in the law. By advancing this argument, appellants, in effect, ask this Court to elevate traditional notions of geographical compactness, contiguity, and respect for political boundaries to constitutional requirements for narrow tailoring purposes. However, in *Shaw* this Court expressly reaffirmed the long-standing rule that adherence to compactness, contiguity and the integrity of political subdivisions in state redistricting is *not* constitutionally required. *See Shaw*, ___ U.S. at ___, 113 S. Ct. at 2827 (majority); *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973); *White v. Weiser*, 412 U.S. 783, 793-97 (1973).

Further, accepting appellants' argument would deny states the discretion and power reserved to them by the Constitution under the decisions of this Court. This Court has repeatedly emphasized that redistricting is fundamentally a political task and a matter for state determination. *See Growe v. Emison*, ___ U.S. at ___, 113 S. Ct. at 1081; *Voinovich v. Quilter*, ___ U.S. at ___,

113 S. Ct. 1149, 1156-57 (1993). Within this area of state domain, the Court has recognized the validity of rational redistricting principles including protection of incumbents and communities of interest. *See, e.g., Gaffney v. Cummings*, 412 U.S. at 754 (recognizing voting strength of political parties); *White v. Weiser*, 412 U.S. at 791 (preserving the core constituencies of incumbent); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) (avoiding contests between incumbents). The inevitable balancing of many different and conflicting interests required in the redistricting process must be left to the state legislatures because they are the organs of government best situated to identify and reconcile these interests. *Growe v. Emison*, ___ U.S. at ___, 113 S. Ct. at 1081; *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). The District Court correctly concluded, after surveying this Court's established precedents, that a rule elevating compactness, contiguity and respect for political subdivisions to constitutional imperatives would "'confuse the purpose of *Shaw's* strict scrutiny standard,' which is not to ensure that the state creates wise or aesthetically-pleasing districts, but to ensure that it 'is not covertly pursuing forbidden ends' when it draws district lines." 861 F. Supp. at 451 (quoting Pildes & Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights*, 92 Mich. L. Rev. 483, 584-85 (1993)).

Appellants would rewrite narrow tailoring in the redistricting context to require the states to abandon rational and traditional redistricting goals such as recognizing historical, cultural and economic communities of interest and preserving the core constituencies of incumbents at the expense of their favored goal of geographic compactness. The District Court refused appellants' invitation to become embroiled in "second-guessing" the "wisdom of legislative judgments about how best to balance competing districting considerations that are not themselves of constitutional stature," 861 F. Supp. at 453-54 & n.49, and refused to reject the

districts drawn by the North Carolina General Assembly based on "rational districting principles" deliberately designed to reflect the "material conditions and interests" of the State's citizens. *Id.* at 475. This Court should likewise refuse appellants' invitation.

Appellants also posit the theory that the remedial districts are not narrowly tailored because they do not incorporate the specific compact minority populations which in their view triggered the State's compelling interest in complying with Sections 2 and 5 of the Voting Rights Act. This argument, like their other arguments, is not supported by the facts.

The District Court's opinion succinctly summarized the evidence establishing the congruence of the remedial districts with Section 5 coverage and Section 2 litigation. The rural First District was drawn in areas of the Coastal Plain with long histories of Sections 2 and 5 compliance problems. The history of race relations in this area was presented through expert and lay testimony and was not disputed by appellants' lay witnesses or experts. Although many of the counties in the Twelfth District are not covered by Section 5, all of its counties have been subject to Section 2 litigation. For example, all of the urban areas included in the Twelfth District were involved in the *Gingles* litigation. It strains credulity for appellants to argue that many of the African-Americans receiving the benefits of being placed in the First or Twelfth Districts are not minorities "who at some earlier time had been precluded from equal political participation." Shaw Juris. Stat. at 24.

C. Burden of Proof

Appellants' final challenge is to the District Court's holding that "plaintiffs retain the ultimate burden of persuading the court either that the proffered justification is not compelling or that

the plan is not narrowly tailored to further it." 861 F. Supp. at 436.

This was not error. The District Court's holding accords precisely with opinions of this Court in reverse discrimination cases under the Equal Protection Clause.[10] In a reverse-discrimination case, where members of the majority race are challenging state affirmative action measures the "ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of the affirmative-action program." *Wygant*, 476 U.S. at 277-78 (plurality). Proof that the challenged state action is race-based can give rise to a presumption of unconstitutionality and thereby shift the burden to the state to demonstrate that its use of race was justified by a compelling governmental interest. *Croson*, 488 U.S. at 505 (majority). However, the burden for the state is one of *production* only, not *persuasion*. To prevail on an equal protection claim, plaintiffs always must "bear the ultimate burden of persuading the court that the [state's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the [remedial action] instituted on the basis of this evidence was not sufficient 'narrowly tailored.'" *Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring).

The District Court's judgment in this case reflects a careful balancing of the mandates of the Voting Rights Act and the Equal Protection Clause as required by *Shaw*. The balance struck by the District Court based on the facts and circumstances of this case is in full accord with the strict scrutiny principles developed in earlier

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[10] It also accords with the decisions of other district courts considering challenges to redistricting plans under *Shaw v. Reno*. *See Johnson v. Miller*, 864 F. Supp. 1354, 1385; *Vera v. Richards*, 861 F. Supp. 1304, 1336-37 (S.D. Tex. 1994) (three-judge court).

opinions of this Court and its judgment should be summarily affirmed.

II. SUBSTANTIAL QUESTIONS, HOWEVER, EXIST REGARDING THE DISTRICT COURT'S DECISION THAT APPELLEES HAD PROVED THEY HAD STANDING TO PURSUE THEIR CLAIMS.

The District Court held:

> We understand Shaw necessarily to have implied a standing principle that accords standing to challenge a race-based redistricting plan to any voter who can show that it has assigned him to vote in a particular electoral district in part at least because of his race.

861 F. Supp. at 427.

This holding was erroneous. Proof of assignment to a district based on race is necessary, but not sufficient, to prove standing to pursue a claim. Race-based assignments to districts are not in and of themselves unlawful and thus by themselves are not sufficient to prove standing to seek redress for injuries. There must, in addition, be proof that the race-based assignment caused injury to representational interests.

Injury to representational interests may not be presumed or inferred; that injury must be proved. *Davis v. Bandemer*, 476 U.S. 109, 132-33 (1986). Appellants offered no such proof at trial. Voter confusion of sufficient magnitude could harm representational interests, but it is plain from the evidence that appellants' proof did not meet that threshold. No evidence was offered by appellants that any voter failed to cast his or her ballot because of confusion about district assignment. Moreover, any

widespread voter confusion would presumably manifest itself through reduced voter turnout. There was no reduction in voter turnout at the 1992 congressional elections in North Carolina. The turnout rate in fact exceeded the turnout in prior North Carolina congressional elections.

III. SUBSTANTIAL QUESTIONS ALSO EXIST REGARDING THE DISTRICT COURT'S DECISION THAT APPELLANTS HAD PROVED A RACIAL GERRYMANDER.

At trial, appellees argued that to prove the racial gerrymander prong of their claim and trigger strict scrutiny, the appellants had the burden of establishing (1) that the redistricting plan creates districts with highly irregular shapes unaccounted for by existing political or natural boundaries; (2) that in one or more of these highly irregularly shaped districts citizens of particular racial groups are concentrated in numbers significantly disproportionate to their representation in the State's population as a whole; (3) that racial considerations caused the highly irregular shapes; and (4) that the shape of the districts has no explanation reasonably related to the purpose of redistricting other than race. Appellees further argued that appellants had the burden of proving each element; that if they proved the first three elements, the burden of production -- but not persuasion -- shifted to appellees; and that if appellees produced an explanation for the shape of the districts rationally related to the purpose of redistricting in addition to race, appellants had the burden of proving that the proffered explanation was not sustained by the evidence in order to trigger strict scrutiny analysis.

The District Court rejected appellees' argument holding that proof that deliberate racial considerations played a "substantial" or "motivating" role in the creation of highly irregularly

shaped districts, even in the face of rational explanations for the shape of the districts other than race, constituted proof of a racial gerrymander and triggered strict scrutiny. 861 F. Supp. at 431. This holding is erroneous; it reads out of the *Shaw* calculus this Court's "conclu[sion] that a plaintiff may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood *as anything other than* an effort to segregate voters into different districts on the basis of race." 113 S. Ct. at 2832 (emphasis added).

The consequences of reading an analysis of explanations for the shape of the districts other than race out of the racial gerrymander prong of a *Shaw* analysis are potentially enormous. By themselves, neither the creation of irregularly shaped districts nor the deliberate consideration of race for the purpose of complying with the Voting Rights Act is unlawful or unconstitutional. Those acts only become potentially unconstitutional when they combine to produce districts bearing no reasonable relationship to providing fair and effective representation for citizens other than race. Leaving out of the racial gerrymander calculus the other-reasonable-explanation-factor, as the District Court did, will inevitably burden the redistricting process with strict scrutiny, especially in states covered by Section 5 of the Voting Rights Act where deliberate consideration of race and racial line drawing is effectively required by federal law. Legislative bodies will be reluctant even to consider plans fully consistent with the purpose of redistricting simply because one or more districts might appear to have what some would perceive as bizarre or unusual shapes. They likewise will be reluctant even to consider plans that promote the integration of leaders of all races into the political process simply because race was deliberately accounted for in drawing such districts. In short, appearance will trump substance and strict judicial scrutiny will be the order of the day.

CONCLUSION

The State appellees respectfully submit that the questions presented by appellants are not so substantial as to need further argument. Therefore, the State appellees move the Court to affirm summarily the judgment entered in the cause by the three-judge United States District Court for the Eastern District of North Carolina.

Respectfully submitted,

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